Supreme Court of the United States.

JOSHUA BISHOP,
APPELLANT,
vs.
THE UNITED STATES.

No. 92
On Appeal from the Court of CLAIMS.
Appellant's Brief.

The appellant, Joshua Bishop (a citizen of the United States, an officer on the retired list of the United States Navy—Finding of fact (1) P. 26 Transcript), on June fifteenth, A. D., Nineteen Hundred, filed his petition in the Court of Claims to recover from the United States the sum of Eight Thousand Twenty-four Dollars and Seventy-nine Cents.

The Petition was filed under and by virtue of a private act of Congress, Approved June 3, 1900 (31 Stat. 1612) entitled Private, No. 645—"An Act for the Relief of Joshua Bishop."

Copy of the Act will be found by reference to Page 5, of the Transcript of the Record.

The Court of Claims, by its order dated March 23, 1903, dismissed Appellant's Petition. On June 2nd, 1903, Appellant made application to the Court of Claims for an allowance of an appeal to this Court, which appeal was allowed June 4th, 1903. P. 42 Transcript of the Record.

Appellant's contention in extenso appears by his Petition P. 1–6 Transcript.

Appellant's contention in substance is, that he is entitled to his claim, because he never was legally out of the Naval Service of the United States; that he was illegally deprived of his rank and pay by virtue of an illegal sentence of an illegal court-martial, and illegal dismissal from the Naval Service.

POINT I.

Appellant insists, that the alleged court-martial had no jurisdiction over him because he had already been punished for the alleged offenses charged against him. The alleged offenses occurred on the 30th day of May, 1867, in the harbor of Nagasaki, Japan.

Proceedings of the court-martial P. 7–25 Transcript.

Appellant insists, that for said offenses he was punished by suspension from duty on May 31, 1867.

It appears by reference to said court-martial proceedings (P. 7 and 8 Transcript), that the Appellant, when called on to plead, answered—"I plead in bar of trial, that I was placed under arrest for the offense specified, and was fully released from said arrest by order of Rear Admiral Bell. I refer the Court to Paragraph 1205, Book of Regulations for the government of the U. S. Navy, and also to the log-book of the "Wyoming."

The log-book entries referred to; P. 31 Transcript, under finding of Fact VI.

Paragraph 1205 of the Regulations of the Navy of 1865, provided—"An offense, committed at any one time, for which a person in the Navy shall have been placed under arrest, suspension or confinement, and subsequently entirely discharged therefrom, by competent authority, or for which he shall have been otherwise fully punished, is to be regarded as expiated, *and no further court-martial proceedings against him for the offense itself are ever afterwards to take place, etc.*"

Paragraph 455 of the Regulations of the Navy, of 1865, provides among other things—"That there shall be entered on the log-slate and log-book, *with minute exactness*, the following par-

ticulars: . . . . The names of all persons . . . . absent without leave; . . . . the nature and extent of all public punishment inflicted, with the name and crime of the offenders."

The log-book record shows, as appears by the same, P. 31 Transcript, that the appellant was suspended from duty by order of his commanding officer, and afterwards restored to duty by the Admiral of the fleet.

It must be presumed, that the navigator of the "Wyoming" complied with Paragraph 454 of the Regulations of the Navy of 1865, in keeping the ship's log-book, and seeing that all the particulars were duly entered; that after making the entry he sent it to the watch officer for signature, *while these circumstances were fresh in their memories*; and that he took the log-book to the commanding officer for inspection, immediately after noon of June 1st, 1867.

The Appellant was not furnished by his Commander, or any other officer, at the time of his suspension, May 31st, 1867, or on September 5th, 1867, when he was arrested for trial, with a copy of the communication and the order marked Exhibit "E," (P. 23 Transcript), as appears by finding of Fact VI, P. 30 Transcript.

The fact is, that the Appellant had no knowledge of Exhibit "E" until the hearing at the court-martial proceedings. Finding of Fact VI, P. 30 Transcript.

The log-book is an official register; it is provided for by statute, and the Book of Regulations for the government of the United States navy, and Appellant insists that the entry on the log-book of the "Wyoming" supra, relating to him, is conclusive; that the log-book shows that he was punished, and was restored to duty, by order, without qualification; that by Paragraph 1205 of the Naval Regulations of 1865 (supra.) the alleged offenses were to be regarded as expiated, and therefore the Appellant was not amenable to further court-martial proceedings for the same alleged offenses.

The Court of Claims in this case (P. 41 of Transcript), Held: "His suspension from duty and restoration to duty, on May 30,

"did not have the effect to relieve him from arrest and conviction "at a subsequent period. His suspension was not a punishment, "but simply had the legal effect of an arrest, and his restoration to "duty only discharged him from the consequences of arrest and "did not have the effect to discharge him from responsibility of "the offense for which he was suspended and for which he was "subsequently tried."

The Appellant respectfully submits, that the conclusion above stated is erroneous.

The facts are as follows:

The Appellant was a commissioned officer; on the 30th day of May, 1867, was punished by suspension for offenses and restored to duty; on September 5, 1867, more than three months after the suspension and restoration, he was served with a copy of charges (Findings of Fact II, P. 26 Transcript), which related to the same subject matter; on September 6, 1867, was tried by court-martial for the same alleged offenses.

Under finding of Fact VI, P. 30, it appears that Appellant had no knowledge or information of Exhibit "E" (P. 23 Transcript) until during the court-martial trial; was not furnished with charges upon which his suspension from duty was predicated, nor was Appellant called upon at any time, for a statement or list of persons, whom he might wish to have relative to them. The charges and specifications were preferred by Rear Admiral Bell at Shanghai, China, and dated June 21, 1867 (P. 21–22 Transcript). The first knowledge that the defendant had that he was to be court-martialed for the alleged offenses of May 30, was that of his arrest and the service upon him of the charges on September 5, 1867.

Was that notice in accordance with the law?

It is provided by Article 10 of the laws relating to the Navy, etc., Approved July 17th, 1862 (12 Stat., P. 63), "That no Commander of a vessel shall inflict upon a commissioned or warrant officer any other punishment than private reprimand, suspension from duty, arrest or confinement, and such suspension, arrest or

confinement, shall not continue longer than ten days, unless a further period is necessary to bring an offender to trial by court-martial . . . . All punishment inflicted by the Commander, or by his order, except a reprimand, shall be fully entered on the ship's log."

The restoration to duty of Appellant on May 31, was not for the purpose of bringing him to trial by court-martial, but for an opportunity to investigate the case. Ex. "E" P. 23 Transcript.

The suspension from duty was a punishment; it was in legal effect an arrest. He was restored to duty, and so far as he knew, without limitation.

Paragraph 1210, "Regulations of the Navy," of 1865, provides, "When an officer is suspended from duty and reported to a superior, the latter will call upon him for such explanation as he may choose to afford, in relation to the affair, and for a list of persons whom he may wish to have questioned in support of them, and the superior may institute general inquiry into the facts and circumstances to regulate his further proceedings."

Paragraph 1212, same Regulations, it is provided, "that if a case is referred to the commanding officer of the squadron to decide whether or not the subject matter shall be scrutinized by court-martial, that in so referring a case for such decision *special care* is to be taken to transmit at the same time to the authority, to whom the appeal is made, a particular statement of the offenses charged, embracing dates, places, and all other facts necessary to a conclusion as to the propriety or expediency of ordering a court martial, *and to frame charges and specifications* in case one should be ordered."

"Explanations of the party accused, etc., should invariably accompany the statement."

Article 38 of Laws Relating to the Navy, etc., approved April 23rd, 1800 (22 Stat. L. P. 50, 51,) which was not repealed by the Act of July 17, 1862, provides, "All charges, on which an application for a general court-martial is founded, shall be exhibited

in writing to the proper officer, and the person demanding the court-martial, shall take care that the person accused be furnished with a true copy of the charges and specifications, at the time he is put under arrest.

(Also Paragraph 1122, Regulations, etc., of 1865.)

Paragraph 1202, "Regulations of the Navy" of 1865, provides: . . . . And if, after the case of an offender to be tried by court-martial has been brought to the notice of the proper authority, empowered to convene such Court, the offender, *owing to imperative reasons*, cannot be brought to trial *within thirty days after that time*, he shall, unless the Secretary of the Navy or the Commander-in-chief otherwise directs, be released from arrest and returned to duty by his commanding officer, and to remain, until a court-martial can convene to try him, when he shall be again arrested on the day before the Court is ordered to convene, so as to undergo his trial before it."

The appellant insists that under the Statutory and Naval Regulations quoted, the court-martial had no jurisdiction over him until it affirmatively appeared that the legal requirements had been complied with.

The Appellant should have been served with a copy of the charges and specifications, as provided by Article 38 of the Act of April 23rd, 1800, supra, on May 31, 1867, when suspended; he should have been called upon for a statement as provided in Articles 1210, 1212, Regulations, etc., supra.

He should have been served with the order of Admiral Bell. Exhibit "E" (P. 20 Transcript), and the order should have been entered on the log-book of the "Wyoming." The Appellant was not furnished with a copy of the charges against him, upon which his suspension from duty was predicated, nor was the Appellant called upon at any time for a statement or list of persons whom he might wish to have, relative to them.

The service of the charges on Appellant, on September 5, 1867, was not a compliance with Article 38 of the Act of April 23, 1800

(22 Stat. L. P. 50–51); that service was more than three months after the 30th of May, when the alleged offenses were committed; and nearly three months after June 21, 1867, when the charges and specifications were formulated.

Paragraph 1202, Naval Regulations 1865 (supra), contemplates the trial of the offender within thirty days after his case has been brought to the notice of the person empowered to convene a court-martial. If he can not be brought to trial within that time, he is discharged from arrest, restored to duty, remains so until a court can be convened to try him, *when he shall be again arrested* on the day before the Court is ordered to convene, so as to undergo his trial before it.

This Paragraph makes no reference to the serving of the charges and specifications on the offender on the day before his trial. It says that the offender *shall be again arrested.*

This Paragraph contemplates the previous arrest of the offender; that he has been previously served with the charges and specifications and that all the Statutory and Naval Regulations have been complied with.

It appears that Appellant's alleged offenses were brought to the notice of Rear Admiral Bell, who was under the law empowered to convene a court-martial, on May 31, 1867. (Ex. "E" P. 20 Transcript). Bell preferred charges on June 21, 1867 (Ex. C. P. 21, 22 Transcript). The Appellant was not amenable to trial by court-martial after July 21, 1867, except under conditions arising under Paragraph 1202, supra; Appellant insists however that, (assuming that because of imperative reasons he could not be brought to trial within thirty days after May 31 or June 21, 1867) the court-martial had no jurisdiction over him, because he had not been furnished with a true copy of the charges and specifications at the time of his suspension or arrest on May 31, nor at any other time previous to September 5, 1867; that Article 38 of Laws Relating to the Navy (supra) relates to the time of the first or previous arrest, and not to the time of rearrest; and because

of the failures or omissions by his superior officers in complying with the law, in giving him notice, as herein above stated. The statutory regulations governing the proceedings of a court-martial must be complied with. In the case of *Brown* vs. *Keene* (8 Pet. 112) it was held :—" The trial, finding and sentence are the solemn acts of a Court organized and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a Court of Justice; *rights which in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any one man, but which must be adjudged according to law.*

The judgment of a court-martial may be collaterally attached. (Ex. Parte Watkins, 3 Pet. P. 270.)

POINT II.

The Appellant insists, that the Court Martial that tried him was illegally constituted.

The Precept for the Court will be found by reference had to the bottom of Page 20 and top of Page 21 of Transcript.

Article Eleven of the Act of July 17th, 1862, 12 Stat., 603, provides—" A General Court Martial shall consist of not more than thirteen nor less than five commissioned officers as members; *and as many officers, not exceeding thirteen, as can be convened without injury to the service, shall be summoned in every such Court*, but in no case where it can be avoided without injury to the service, shall more than half, exclusive of the President, be junior to the officers to be tried. The senior officer shall always preside and the others shall take place according to their rank."

Appellant's insistment is, that the court-martial that tried him, consisting of less than thirteen members, had no power or authority to try and sentence him without showing affirmatively, that as many officers, not exceeding thirteen, as could be convened without injury to the service, could have been summoned.

It is held in *Mills* vs. *Martin*, 19 Johns, (N. Y.) P. 29, that

the officer instituting the court-martial is *to judge and decide on the point of injury to the service*; that the officer is bound to adjudicate and to express his opinion to that effect, whenever he directs a general court-martial to consist of less than thirteen members, and the fact of injury to the service ought to have been averred, in order to show jurisdiction of a less number than thirteen.

In *Runkle* vs. *U. S.* 122 Sup. Ct., Rept. P. 543, C, it is held, that to give effect to sentences of court-martial it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentences were conformable to law. In the case of *Brown* vs. *Keene* 33, U. S. (8 Pet.) 115, etc., it is held that the authority of a court-martial is statutory; that the facts necessary to show their jurisdiction must be stated positively; that it is not enough that they may be inferred argumentatively. An inspection of the precept Ex. "A," P. 27, Transcript, will show, that there is no averment why more than the seven officers, as members, to the number of thirteen could not have been convened, without injury to the service.

We insist that the omission of such an averment or the omission of an averment to the effect that only the officers as members as were convened, were all that could be summoned without injury to the service; or the omission of an averment that no other officers than those named could be summoned without injury to the service, is jurisdictional and fatal to the jurisdiction of that Court.

Had the statutory provision (Article II, supra,) only recited that, "A court-martial shall not consist of more than thirteen, nor less than five commissioned officers as members, ... who shall be summoned on every such Court," it might be construed that the Act was merely directory; that the officer appointing the Court could exercise discretion in selecting not less than five or more than thirteen; that the number to be selected between five and thirteen was in a manner submitted to his sound discretion.

But Congress did not intend that the liberty and property

rights of its servants who support the honor and integrity of the United States under arms, should be hazarded by the *ipse dixit*, or whim of one man, superior in rank to the accused, and who may, or may not be prejudiced against the accused. Congress meant further: it directed that as many officers up to, but not exceeding thirteen, as can be convened without injury to the service, shall be summoned on every such Court. Does not that call upon the convening officer to state or aver, after he has made his appointment, that no more officers can be convened without injury to the service? The Act means that the summoning officer must convene a court of thirteen officers as members, and if the Court does not contain that number, he must aver in the precept that a greater number could not be summoned without injury to the service.

If the precept in question is good, then does the Article mean the same as if it read that the convening officer may, if deemed advisable, convene a court-martial composed of any number of officers between five and thirteen. But it is held in 4 Wallace (S. C.), P. 709, 446 that where power is given by permissive language to do certain things, the language used will be regarded as peremptory when the public interests or individual rights require that it should be done.

By the Regulations for the government of the Navy, 1900, Paragraph 1837, P. 457, it is now provided, "A statement that no other officers than those named can be summoned without injury to the service, shall be an essential part of the order convening the Court, etc." That provision is nothing new, because that always was the law.

When the statutory conditions as to the constitution of the jurisdiction of the Court are not observed, there is no tribunal authorized by law to render the judgment. *Keyes* vs. *U. S.*, 109 V. S., P. 136.

Wells on Jurisdiction of Courts, Ed. 1880, Sections 15-17, P. 11 and 12.

In regard to inferior Courts, their action must be confined

strictly within the prescribed limits, and must appear so on the face of the proceedings as also the facts and ground of jurisdiction. A general averment of jurisdiction amounts to nothing; the facts upon which it depends must specifically appear. Nor is it sufficient that jurisdiction may be inferred argumentatively from the averments, but the jurisdiction must be positively averred, and the fact upon which it depends expressly set forth; every fact essential to the jurisdiction should appear on the record.

Wells on Jurisdiction, supra., Sections 40, 41, 42; P. 19, 30.

Precept Ex. "A" as it is, or even if it recited as we insist it should have been recited, Appellant has the right to impeach by the record or dehors the record.

It is held in People Ex. Rel. *Fry* vs. *The Warden*, etc. 100 N. Y., P. 26, with reference to Courts of limited and inferior jurisdiction, "Whether the record recites the jurisdictional facts or not, it has uniformly been held that their judgments are open to impeachment by extrinsic evidence showing want of jurisdiction."

It may be advanced that, although the Precept Exhibit "A" is defective as pointed out, that the Court had no jurisdiction over the Appellant, yet Appellant did not challenge the Court because of that defect. The answer is, the omission in that respect did not operate as a waiver or an estoppel.

Whether it is competent to an accused to waive an objection to the jurisdiction of the Court is questionable.

Brook vs. *Davis*, 17 Pick. (Mass.) 148.

Brook vs. *Davis*, 22 Pick. (Mass.) 498.

Consent cannot give jurisdiction in a criminal case, where the indictment is for a subject matter out of the jurisdiction, not even if the prisoner enter of record a waiver of "all objections" to an irregularity in finding of indictment and to jurisdiction; or where the law imperatively requires twelve jurors, and by consent the case is tried by six only, etc.

Wells on Jurisdiction of Cts., Section 66, P. 47, 48.

POINT III.

Said court-martial proceedings are void, because Rear Admiral H. H. Bell, who convened said Court, did not approve or confirm the findings and sentence of said Court.

The Rear Admiral forwarded the proceedings, without record that he either reviewed, or approved, or confirmed or disapproved same. P. 29 Transcript.

It is provided in Article 20, of Act of July 17th, 1862, Chapt. 204, 12 Stat. 600, "Every officer who is authorized to convene a general court-martial shall have power on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such Court which he is authorized to approve and confirm."

That the language of Article 20, was construed by the Navy Department to be mandatory, and not permissive, is plain.

Paragraph 1239, Regulations 1865, provides, "The sentences of all courts-martial not which may be but which shall be approved on a foreign station, etc."

As early and before October 27th, 1824, it was a requirement and an essential one, in cases of general court martial, that the officer convening such a Court should not only approve or disapprove the proceeding, but whether approved or disapproved, reasons therefor should be stated.

In re Lieutenant Joshua R. Sands and in re Midshipman John M. Rinker, the American State Papers, Naval Affairs, Vol. 2, P. 539, 540.

In Vol. II, Opinion of Atty. Gen., P. 19, etc., it is stated, "I have quoted Art. 20 because it shows that Congress intended that the officer who is authorized to approve and confirm the sentence of a court-martial, uuder this Act, in reviewing its proceedings, should act *judicially*; that is that he should exercise the discretion confided to him within the limits of the law."

Also *Runkle* vs. *U. S.*, supra, P. 543, etc., in which the remarks of Attorney General Bates, in an opinion furnished to President Lin-

coln, under date of March 12th, 1864, (11 Attorney General, 19, 20, 21) concerning the review and approval of proceedings, are approved.

Our insistment is that the forwarding of the proceedings without reviewing or approving same, taken in connection with the fact that Appellant was ordered to perform a duty, operated as a disapproval and a discharge of the proceedings and sentence.

Such officer, whenever authorized to approve, may, instead, disapprove; disapproving being simply the absence or withholding, stated in terms, of the approval or confirmation which is necessary to the taking effect of the judgment of the Court." (I Withorp's Military Law, P. 689). 689

A disapproval of a sentence by the proper reviewing officer, release from confinement, and restoration to duty is tantamount to an acquittal by the Court. (Op. Atty. Gen'l. XIII, P. 459)

POINT IV.

We further insist that said proceedings and sentence, as well as the order of dismissal (P. 30 Transcript) are absolutely void, because the Appellant, a Lieutenant Commander and a commissioned officer of the Navy of the U. S., was dismissed from the naval service by the sentence of a court-martial without said sentence being confirmed by the President of the United States.

Art. 19 of the Act of July 17th, 1862 (12 St. L. P. 600) provides, that "No sentence of a court-martial, extending to the loss of life, or the dismissal of a commissioned or warrant officer, shall be carried into execution until confirmed by the President." Evvery sentence of a court-martial is interlocutory and inchoate until *an order of confirmation* by the commanding officer.

The proceedings of the court-martial are not definite, but merely in the nature of an inquest, to inform the conscience of the commanding officer.

Mills vs. *Martin*, 19 Johns, Rep. P. 30.

That the President must confirm such sentence; that his ap-

proval must be authenticated in a way to show otherwise than argumentatively; that his approval is the result of his own judgment and not a mere departmental order, which may or may not have attracted his attention, and the fact that the order was his own and not left to inference only; that the action required of the President is judicial and not administrative, is clearly laid down in the case of *Runkle* vs. *U. S.*, 122 U. S. P. 543.

In Appellant's case, a Clerk—not the Secretary of the Navy or the President of the United States, reviewed the court-martial proceedings; the Clerk prepared the Brief (Finding of Fact V, P. 29, Transcript.)

The President *did not have before him the court-martial proceedings at any time; the only paper the President saw and signed* was that Brief.

Admiral Bell having disapproved the proceedings and sentence of the court-martial, the approval of the President (if the action of the President in signing Ex. C, P. 29, Transcript, was an approval according to law) was a nulity. (I Winthrop's Military Law, P. 689.

POINT V.

Appellant respectfully submits, that he was not lawfully out of the naval service, and is therefore entitled to pay in amount as found by the Court of Claims. (Finding of Fact, P. 32-3-4 Transcript.)

The U. S. S. "Wyoming" was a war-ship. (Paragraph IX, Naval Regulations 1865.)

Appellant on September 12, 1867, received from Admiral Bell the order of detachment (P. 2 Transcript). Afterwards reported to Navy Department in obedience to said order and by virtue of Paragraph LXXXIX Naval Regulations 1865.

Appellant's pay was changed from sea to shore pay, under provisions of Paragraph 1164, Naval Regulations 1865; which

Regulation was overruled by Symond's Case (120 U. S. Rept. P. 46.)

Defendant is entitled to sea instead of shore pay from September 13, 1867, to February 9, 1868.

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